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The Long Arm of the Law: Abortion Access for Unaccompanied Minors

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The Long Arm of the Law: Abortion Access for Unaccompanied Minors

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Report

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Master of Public Affairs

The University of Texas at Austin

May 2018

Dedication

To the Janes represented in *Garza v. Hargan*, and every other Jane who has been and will be prevented by circumstance—purposefully manufactured and otherwise—from exercising her constitutional rights.

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. *It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."*

—*Frost & Frost Trucking Co. v. Railroad Commission of California,* U.S. Supreme Court, 1926

Acknowledgements

Many thanks to: my readers, Drs. Aiken and Wasem, for their insight, encouragement and willingness to share their time and expertise with me for the duration of my work on this project; Amanda Bennett from Jane's Due Process, for helping shape my initial research question and giving valuable feedback; Jen Cooper at the LBJ School Writing Lab, for helping me think through early outlines and bring the final draft up to snuff; Prof. David S. Cohen at the Thomas R. Kline School of Law at Drexel University, for generously spending time addressing my early questions about relevant law and accepted legal thinking on these issues; my dearest friends, Cecily Yeager and Katie Pope, who listened patiently to more than one disorganized verbal draft of this document as I thought through all the material; and finally, my parents and younger brother, who prioritized my mental health and well-being at times when I didn't, who reassured me when I doubted my ability to develop sufficient comprehension of the issues, and who challenged me to hold out for a final product with which I would be enduringly satisfied.

Thanks so, so much, y'all.

Executive Summary

The Long Arm of the Law: Abortion Access for Unaccompanied Minors

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The University of Texas at Austin, 2018

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In part one of this report, I use the ongoing legal case *Garza v. Hargan* as a framework for the discussion and analysis of laws and policies that govern abortion access for unaccompanied female minors in the United States. I give particular attention to the Office of Refugee Resettlement [ORR]'s history with faith-based NGOs, the evolution of abortion law as it pertains to this population and an analogous population (incarcerated women), and the more extreme measures taken by anti-abortion advocates and policymakers. I conclude with a consideration of the impact of ad-hoc policymaking, a reflection on the implications of the recent Supreme Court decision *Obergefell v. Hodges*, a detailed analysis of ORR's current policies (their flaws and possible solutions) and a broader call to action.

In part two, I include a functional document written in collaboration with an interested organization, to help certain interested parties quickly become educated about this issue and the *Garza* case, enabling them to engage in practical work from a well-informed foundation.

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PART ONE

The Supreme Court settled the matter of a woman's constitutional right to end a pregnancy in the 1973 landmark case, *Roe v. Wade*, and the core principles underlying the decision have been maintained through subsequent cases.[1] Yet debate over the legal and moral boundaries around this issue has remained heated and divisive. Obtaining an abortion is still a fraught proposition for women across the United States, especially for undocumented female immigrant minors. While this paper addresses certain aspects of law and policy that govern a woman's right to access abortion care, it does not engage with the morality of abortion as a practice. Rather, this paper is concerned with a narrow population of women in rare, extenuating, and extremely vulnerable circumstances, and with the current federal administration's direct interference in their lives, their decision-making process, and their ability to exercise their constitutional rights.

My discussion will center on the recent and ongoing legal case *Garza v. Hargan*, concerning four undocumented female immigrant minors known only as Janes Doe, Poe, Moe and Roe. Federal administration officials have directly obstructed the Janes in their attempts to legally access abortion care. Their representatives have sought both temporary relief for the current Janes and any other undocumented female minors in federal custody, as well as a final court order that will force administrative compliance with the law. This case will provide a framework for a discussion and analysis of current law and policy.

The transition in 2017 from the outgoing presidential administration to the current one could be fairly characterized as tumultuous, regardless of one's political leanings. For the average American, it revealed that much of what we expect during and immediately following a presidential transition has until now been governed by norms rather than formal

[1] Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First-Century America,* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2017).

policies and procedures. As it turns out, norms rather than policies govern other high-profile processes, such as the determination of the level of security clearance needed to view the president's daily intelligence brief, as well as lower-profile processes, such as the permission or restriction of unaccompanied minors' access to legal medical care. The clarity and veracity with which we affirm the constitutional rights of those most vulnerable has implications for us all. We must also carefully scrutinize the degree to which "ad hoc" policymaking that has allowed political appointees to interfere directly in one of the most personal decisions a woman may ever make—in the lives of women already in circumstances beyond most of our comprehension.

Who are these women? What is the problem?

Thousands of unaccompanied minors from Central America are detained at our borders each year as they flee violence or poverty.[2] For young women, an already harrowing experience is often compounded by sexual violence and assault, either before they leave home or during their journey.[3] Upon their arrival, they are detained and placed in a shelter under the auspices of the Office of Refugee Resettlement [ORR], a subsidiary branch of the federal Department of Health and Human Services [HHS]. Unaccompanied minors are the only undocumented immigrants whose cases fall under the purview of ORR, rather than Immigration and Customs Enforcement [ICE].[4] The Janes represented in *Garza v. Hargan* are all unaccompanied minors who found out they were pregnant while in ORR custody and sought access to abortion care.

As the name implies, ORR was originally established to facilitate aid to refugees per the Refugee Act of 1980.[5] Giving aid to refugees is a major tenet of many faiths, especially Christian faiths, so it is unsurprising that faith-based organizations would have established collaborative relationships with ORR soon after its establishment. In the years that followed, legislation expanded the population served by ORR to include, among others, the undocumented minors of concern in this discussion.[6] The long-standing relationship between ORR and faith-based organizations has some significant bearing on the situation as it stands, and therefore warrants a brief examination here.

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[2] Erik Eckholm, "Suit Challenges U.S. Over Abortions and Birth Control for Immigrant Minors," *The New York Times*, June 24, 2016.
[3] Ibid.
[4] "Detention Management," U.S. Immigration and Customs Enforcement, January 3, 2018. Accessed April 15, 2018. https://www.ice.gov/detention-management.
[5] Todd Scribner, "You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump," *Journal on Migration and Human Security* 5, no. 2 (2017).
[6] "Detention Management," U.S. Immigration and Customs Enforcement.

ORR AND VOLAGS: STANDARDS OF CARE AND RELIGIOUS EXEMPTIONS

ORR has established certain standards of care for unaccompanied minors under their purview.[7] Because ORR does not provide these services directly, these standards are imposed on the care providers ORR contracts with at the local level. In 1997, a class action lawsuit *Flores v. Reno*, filed on behalf of undocumented minors, resulted in the Flores Agreement.[8] This document has guided the adaptation and development of ORR policies for this population. Of direct relevance to this discussion, ORR's policy guide for unaccompanied minors states that per the terms of the Flores Agreement, care providers are required to provide:

> appropriate…family planning services, including pregnancy tests and *comprehensive information about and access to* medical reproductive health services and emergency contraception, and emergency health care services, including a complete medical examination (including screenings for infectious disease) within 48 hours of admission.[9]

ORR has historically contracted with three main types of non-governmental organizations [NGOs] to provide services at the local level: Voluntary agencies, mutual assistance associations, and support agencies. Voluntary agencies, or VOLAGs, are large organizations with both national and local offices.[10] From their national offices, they work directly with ORR and the State Department to begin coordinating service provision for refugees, often through mutual assistance associations [MAAs] and/or other support agencies.[11] Currently, there are nine VOLAGs and of those nine, six are faith-based

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[7] "ORR Guide: Children Entering the United States Unaccompanied," Office of Refugee Resettlement, January 30, 2015. Accessed March 28, 2018. https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.

[8] *Flores v. Reno Stipulated Settlement Agreement.* 1997. CV 85-4544-RJK(Px) (U.S. District Court, Central District of California, January 17).

[9] "ORR Guide," Office of Refugee Resettlement; emphasis mine.

[10] Stephanie J. Nawyn, "Faith, Ethnicity, and Culture in Refugee Resettlement." *American Behavioral Scientist* 49, no. 11 (2006).

[11] Ibid.

NGOs.[12] Some have religious objections to the provision of certain reproductive health services, such as abortion and contraception, in direct opposition to the terms of the Flores Agreement outlined above.[13] An interim rule developed by ORR in December of 2014 attempted to reconcile the religious beliefs of VOLAGs and the contractors beneath them, often themselves faith-based groups with similar beliefs, with the standards of care to which unaccompanied minors are entitled.[14] Service entities with religious objections are encouraged to use one of three possible exemptions, while still contracting with ORR. They may:

> **(1)** Serve as sub-grantees—… Grantees must ensure that their overall program provides all of the required services, but grantees can use sub-grantees to provide some services. Under this arrangement, as long as other sub-grantees are readily available to provide [unaccompanied minors] with the objected-to services, a sub-grantee may participate in the grant program while declining to provide services to which they have a religious objection.
>
> **(2)** Apply in a consortium--faith-based organizations [may] apply in a consortium with one or more partners. The consortium would allow for a division of responsibility consistent with each organization's principles. Again, as long as [unaccompanied minors] have timely access to all required services, different organizations could divide up the services provided.
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> **(3)** Notify grantor--In some circumstances, … the grantee could … notify the federal program office responsible for the grant if a[n] [unaccompanied minor] … may qualify for or be entitled to any program services, including referrals, to which the organization has a religious objection. It would then be the federal agency's responsibility to secure the provision of the needed services.[15]

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[12] "Voluntary Agencies," Office of Refugee Resettlement, July 17, 2012. Accessed March 27, 2018. https://www.acf.hhs.gov/orr/resource/voluntary-agencies.
[13] Eckholm, "Suit Challenges U.S. Over Abortions and Birth Control for Immigrant Minors."
[14] "Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children; Final Rule," Office of Refugee Resettlement, *Federal Register* 79, no. 247, December 24, 2014. 77768.
[15] Ibid.

Together, these exemptions give a variety of alternatives to VOLAGs that object to directly providing certain services for religious reasons, and the policy makes it clear that while they are permitted to refuse to provide such services themselves, they are required to refer as necessary so that unaccompanied minors can still access the care to which they are entitled.[16] One of the largest grantees, the U.S. Conference of Catholic Bishops [USCCB], released a statement in February of 2015, in collaboration with several fellow VOLAGs and other organizations with a vested interest in such policies, saying that the imposition of these standards constituted an infringement on their free exercise of religion.[17] The USCCB went so far as to say that even requiring them to refer an unaccompanied minor for abortion or contraception services elsewhere was an intolerable level of involvement in a practice they considered immoral, and a level of involvement which the government could not lawfully require of them under the protections of religious liberty.[18] Although the rule stood, some entities appeared to ignore it. The American Civil Liberties Union [ACLU] filed a lawsuit in April of 2015, claiming that many recipients of ORR-funded grants were simply refusing to provide those services to which they had a religious objection.[19] The ACLU asserted that undocumented female minors were routinely refused the comprehensive family planning services to which they were entitled under the Flores Agreement, and were removed from some facilities after requesting abortion care and sent to others—sometimes across the country—thereby disrupting or outright removing any

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[16] Ibid.

[17] Eckholm, "Suit Challenges U.S. Over Abortions and Birth Control for Immigrant Minors."

[18] "Comments on Interim Final Rule on Unaccompanied Children," United States Conference of Catholic Bishops, February 20, 2015, http://www.usccb.org/about/general-counsel/rulemaking/upload/02-20-15-comments-UM.pdf.

[19] "ACLU Files Lawsuit to Investigate Scope of the Problem and Government's Role in Denying Care," American Civil Liberties Union, April 3, 2015, https://www.aclu.org/news/religious-organizations-obstruct-reproductive-health-care-unaccompanied-immigrant-minors.

support system they may have developed during their stay.[20] The barriers between these women and legal, constitutionally-protected reproductive health care—especially abortion—have only increased with the change in leadership under a new administration that has been avowedly anti-abortion since the start of its tenure.

THE TRANSITION: SCOTT LLOYD, KEN TOTA AND MARGARET WYNNE

In March of 2017, the new administration appointed Scott Lloyd as the new Director of ORR, replacing Acting Director Ken Tota. Lloyd had worked as a lawyer for HHS during the Bush Administration.[21] While in that role, he authored a rule—later rescinded—that allowed medical providers to deny care they found morally objectionable, such as contraception and abortion.[22] Lloyd has been a vocal anti-choice advocate throughout his career, and has demonstrated either a lack of knowledge or willful ignorance about contraception and abortion. He has asserted that contraception can itself cause abortion, and that women who accept contraception care covered by federal funds should be required to sign a contract and promise "not to have an abortion if the contraception fails, which it often does."[23] To be clear, contraception does not cause abortion and while contraception varies in its effectiveness, when used properly most methods can be highly effective.[24]

Earlier in March, Acting Director Tota had issued a memo outlining a change in ORR policy with regards to requests for access to abortion care. Tota himself has not been as vocally anti-choice as Scott Lloyd, but prior to becoming ORR Deputy Director in 2008,

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[20] ACLU of Northern California v. Burwell, 3:16-cv-3539 (N.D. California. 2016).
[21] Rachel Siegel, "The Trump official who tried to stop a detained immigrant from getting an abortion," *The Washington Post*, October 26, 2017.
[22] Ibid.
[23] Ibid.
[24] "How effective is contraception at preventing pregnancy?," United Kingdom Health Service, June 30, 2017. Accessed April 15, 2018. https://www.nhs.uk/conditions/contraception/how-effective-contraception/.

in which position he has served ever since, he worked for the U.S. Conference of Catholic Bishops, which has had a contentious relationship with ORR over matters related to abortion and contraception, as previously noted.[25] Referring to a memo from 2008,[26] Tota said in his own March 2017 memo that an abortion constitutes a "serious medical service" that necessitates "heightened ORR involvement and limited decision-making by grantees."[27] Any request was therefore to be referred to the Director's office and could only proceed pending the Director's personal approval. Although the 2008 memo does characterize abortion as a medical service with different implications than any of the other care undocumented minors might receive while under the auspices of ORR,[28] in neither the Bush Administration nor the Obama Administration was this standard ever operationalized to involve the personal involvement of the ORR Director or his office. This change in policy came to the attention of the ACLU when an undocumented female minor in Texas was barred from leaving her shelter to access abortion care. The result was a months-long legal battle, which expanded to include three other undocumented female minors and a class action suit, detailed below.

Tota also signaled another possible shift in policy during his tenure as Acting Director by his actions regarding a previous unnamed, undocumented female minor being detained by ORR. In the same memo referenced above, he indicated that he had been made aware that the young woman in question had begun the process of receiving a medication abortion (i.e., had taken the first pill and was awaiting the second).[29] He directed staff to

[25] "Kenneth Tota," U.S. Administration for Children and Families, January 20, 2017. Accessed April 15, 2018. https://www.acf.hhs.gov/about/leadership/ken-tota.
[26] David Siegel, "Memorandum on Medical Services Requiring Heightened ORR Involvement," March 21, 2008.
[27] Kenneth Tota, "Memorandum on ORR custodial decisions to preserve the health of a pregnant UAC," March 4, 2017.
[28] Siegel, "Memorandum on Medical Services Requiring Heightened ORR Involvement."
[29] Tota, "Memorandum on ORR custodial decisions to preserve the health of a pregnant UAC."

take her to a local hospital to "determine the health status of [her] and her unborn child," and specified that "if steps [could] be taken to preserve the life of the [woman] and her unborn child, those steps should be taken."[30] To the ACLU and other interested parties, this seemed to indicate a belief in—and willingness to impose on others—a practice known as "abortion reversal," for which neither rigorous nor compelling scientific evidence regarding its efficacy exists, and which is described in greater detail below. In his deposition from December 18th, 2017, Scott Lloyd responded to ACLU lawyer Brigitte Amiri's questions about the memo by confirming that as a special advisor and member of the transition team, he was involved with the decision to send the aforementioned young woman to the hospital, and that he discussed the efficacy of "abortion reversal" with "other transition staff [in ORR], including attorneys."[31] When asked why ORR would take such measures he replied, "I don't know, I mean except to save the life of the baby."[32] The young woman referenced in the March memo did ultimately proceed to take the second dose and complete her medication abortion.

To comprehensively outline the individuals that most prominently figure in this story, one other person merits mention here. Margaret Wynne served as director of the House Pro-Life Caucus for several years before becoming an HHS official during the Bush Administration and continuing her tenure into the Obama Administration.[33] Throughout those years, both in and out of ORR, she was known by her colleagues to be avidly anti-abortion, and to actively seek ways to shape policy in line with that view.[34] Although she

[30] Ibid.
[31] Garza v. Hargan. 17-cv-02122-TSC (U.S. District Court of D.C. 2018).
[32] Ibid.
[33] Jonathan Blitzer, "The Trump Officials Making Abortion an Issue at the U.S.'s Refugee Office," *The New Yorker*, October 26, 2017.
[34] Ibid.

left HHS in 2016, she returned after Trump was elected in November and became the main point person directing and approving policy changes until Lloyd was appointed in March.[35]

An important thing to note here is that the overall problem of ORR's direct interference in these matters is wholly unrelated to the debate over whether the government should assist with the cost of abortion care. Per the Hyde Amendment, passed in 1976 and later amended, federal funds can only be spent on abortion in cases where the pregnancy is the result of rape or incest, or in cases where the life of the mother would be endangered by carrying the fetus to term.[36] In December of 2017, another anonymous undocumented minor did indeed request federal funds to cover her abortion (which resulted from rape), and was denied both funding and access to abortion care.[37] But in October of 2017 the first Jane—"Jane Doe"—had arranged to independently cover the costs of the procedure and related transportation. She only required the staff at her shelter to allow her to leave long enough to receive care, which they refused to do, under the direction of Scott Lloyd.

Another important point concerns the outright illegality of this change in the interpretation of the power vested in the ORR Director by the 2008 memo. In *Doe v. Bolton*, the Supreme Court ruled that "no one could override a woman's decision [to abort]," and then extended that protection to minors in *Bellotti v. Baird*.[38] *Bellotti v. Baird* requires states that enact "parental consent laws"—laws that require a minor to solicit the consent of a parent or guardian before obtaining an abortion—to provide minors a legal alternative to parental consent, holding that "no one…may have an absolute veto over a pregnant girl's

[35] Ibid.
[36] Alyssa Engstrom, "The Hyde Amendment: Perpetuating Injustice and Discrimination after Thirty-Nine Years," *Southern California Interdisciplinary Law Journal* 25, no. 2 (2016).
[37] Garza v. Hargan.
[38] Sanger, *About Abortion*.

abortion decision."[39] Yet by reinterpreting the language of this memo, Wynne, Tota and Lloyd are attempting to do just that.

[39] Ibid.

Garza v. Hargan and Janes Doe, Roe, Poe and Moe

In September of 2017, the undocumented female minor henceforth referred to as "Jane Doe" communicated to staff at her shelter that she wanted an abortion.[40] With the assistance of Jane's Due Process (a nonprofit organization that provides free legal guidance and representation to minors seeking abortion in Texas) Jane Doe successfully obtained a judicial bypass.[41] A judicial bypass is a court order issued by a judge and is legally required in the state of Texas whenever a minor wishes to access abortion care but can't or doesn't want to seek parental consent.[42] Having obtained the judicial bypass, Jane Doe sought to leave her shelter to receive an abortion. Shelter staff, under official direction from ORR Director Scott Lloyd, refused to allow her guardian to escort her to her appointments.[43] Additionally, ORR officials required Jane to receive "life-affirming counseling" at a crisis pregnancy center [CPC], a facility with an explicitly religious and anti-abortion mission.[44] ORR officials also contacted Jane's parents—at whose hands Jane had suffered abuse in the past—in her country of origin, against her express wishes, and attempted to open lines of communication for the purpose of allowing them to leverage their opinions about Jane's pregnancy on her decision to abort.[45] Rochelle Garza, Jane's court-appointed guardian ad litem, requested a temporary restraining order which was ultimately granted, allowing Jane to get her abortion.[46] The case soon expanded, however, to include a succession of three additional undocumented female minors—Janes Roe, Poe and Moe.[47]

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[40] Garza v. Hargan
[41] Ibid.
[42] "What is a judicial bypass for abortion?," Jane's Due Process, Accessed April 15, 2018. https://janesdueprocess.org/judicial-bypass-abortion/.
[43] Garza v. Hargan
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.

Jane Roe and Jane Poe both requested access to abortion care in November of 2017, but ORR officials imposed restrictions on them in a fashion similar to Jane Doe.[48] In the case of Jane Roe, this meant that when the court finally required her release, her pregnancy had developed far enough that she could no longer receive a medication abortion, which is the least physically invasive option available.[49] For Jane Poe, her access to care was delayed so much that she approached the legal limit for abortion in her state of current residence.[50] The logical consequence of such obstruction on the part of ORR is that either or both women would have been forced to carry their pregnancies to full term and gone through the process of childbirth, had the court not intervened on their behalf.

Jane Moe, the most recent detainee to be subjected to the direct interference of ORR, made her initial request to receive abortion care in late December of 2017[51] and was denied access until January of 2018, at which point she was released to a sponsor and it is unclear from reports whether she was still eligible for and received a legal abortion.[52] In their most recent filing, the ACLU has adopted a class action lawsuit, in addition to their ongoing representation of Janes Doe, Roe, Poe and Moe in their individual cases against HHS and ORR. They contend that without a court decision that will apply to any future undocumented female minors, like the recent Janes, Scott Lloyd and ORR will continue to impose an "unconstitutional veto" on any similar attempts to access abortion care. In addition to the lawsuit proper, the ACLU also sought a temporary injunction against ORR to prevent Lloyd and his staff from blocking any future undocumented female minors from

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[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Brigitte Amiri, "Access to Abortion for Young Immigrants in Government Custody," April 3, 2018, https://www.aclu.org/blog/reproductive-freedom/abortion/access-abortion-young-immigrants-government-custody.

accessing abortion care while in their custody, as the lawsuit itself makes its way through the lengthy legal process.[53] On April 3rd of 2018, the United States District Court for D.C. granted this injunction.[54]

CPCs and "Abortion Reversal": The Fringes of the Abortion Debate

It is important here to provide some context for why the ACLU and other advocates consider Scott Lloyd's actions—requiring grantees to refer women who request abortion care to CPCs and considering whether to impose an "abortion reversal" onto the unnamed minor back in March—so radical and so grievous.

CPCs are facilities, typically associated with faith-based organizations, that provide explicitly anti-abortion counseling to pregnant women.[55] Their origins can be traced back to the 1960s, when states began decriminalizing abortion in the lead-up to *Roe v. Wade*.[56] Often, they deliberately design the outside of their facilities to resemble women's health clinics, or abortion clinics, and choose names that make their purpose ambiguous to women seeking pregnancy- or abortion-related care.[57] The women they serve are often young, poor and less educated than the general population.[58] Often, their staff are not licensed health care professionals, and they frequently disseminate inaccurate information about the risks associated with abortion, as well as contraception.[59] Indeed, many states whose legislatures possess strong anti-abortion sentiment have so-called "informed consent" laws that require

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[53] Garza v. Hargan
[54] Amiri, "Access to Abortion for Young Immigrants in Government Custody,"
[55] Brittany A. Campbell, "The Crisis Inside Crisis Pregnancy Centers." *Boston College Journal of Law & Social Justice* 37, no. 1 (2017).
[56] Ibid.
[57] Aziza Ahmed, "Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment," *The Journal of Law, Medicine & Ethics* 43, no. 1 (2015).
[58] Joanne D. Rosen, "The Public Health Risks of Crisis Pregnancy Centers." *Perspectives on Sexual and Reproductive Health* 44, no. 3 (2012).
[59] Ibid.

health care professionals to lie to their patients about possible risks and consequences of abortion, such as an increased risk of breast cancer or suicide, or the inflicting of pain on the fetus during the abortion process. Although these professionals are free to refute such false information in their communications with their patients, this still results in an unnecessarily confusing and perturbing experience for women who are seeking safe, constitutionally-protected medical care. Several other states have attempted to impose regulations on CPCs that prioritize women's ability to make fully and accurately informed decisions, most notably (and recently) California. As of this writing, the United States Supreme Court has yet to rule in the case of *National Institute of Family and Life Advocates [NIFLA] v. Becerra*, in which NIFLA has contested the constitutionality of California's Reproductive FACT Act.[60] Signed into law in 2015, the FACT Act requires CPCs to "disclose [verbally, or post signage indicating] whether they have medical personnel on staff and inform women that the state offers subsidized contraceptives and abortion,"[61] as well as provide the phone number to the county social services office where women could solicit additional information about any of these services if so desired.[62] Lawyers representing NIFLA assert that the law infringes on CPC members' First Amendment rights.[63]

As mentioned above, a so-called "abortion reversal" is a proposed method by which a woman who has begun a medication abortion can allegedly disrupt the process and preserve the pregnancy. To medically induce an abortion, a woman first ingests

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[60] Robert Barnes, "Supreme Court takes case on free speech rights of antiabortion counseling centers," *The Washington Post*, November 13, 2017.
[61] Bill Chappell, "Supreme Court Takes On Case About Free Speech And Abortion," *NPR: the two-way,* November 13, 2017, https://www.npr.org/sections/thetwo-way/2017/11/13/563737297/supreme-court-takes-on-case-about-free-speech-and-abortion.
[62] Erwin Chermerinsky, "In California, free speech meets abortion," *The Los Angeles Times*, October 16, 2015.
[63] Chappell, "Supreme Court Takes On Case About Free Speech And Abortion."

mifepristone, a progesterone antagonist that disrupts the pregnancy itself, followed a day later by misoprostol, a drug that causes uterine contractions that expel the fetus.[64] The theory behind an "abortion reversal" is that by taking high doses of progesterone after ingesting mifepristone, it is possible to somehow counteract its effects.[65] There is no conclusive evidence to support this as an effective medical intervention for the purpose of halting the abortion process or preserving a fetus.[66] Yet, similar to the laws in many states requiring health care professionals to disseminate false information about abortion, two states have laws (with many proposed and debated elsewhere) that require professionals to inform women seeking abortion care that such an "abortion reversal" procedure exists, should they change their mind after beginning the abortion process.[67]

COMPARISON: INCARCERATED WOMEN AND ABORTION ACCESS

The government's case for interference in this matter rests on the grounds that as a public entity, ORR should not be required to "facilitate" the provision of abortion services.[68] This implies that Scott Lloyd would prioritize his interests—in avoiding any degree of involvement in the execution of an abortion as Director of ORR—over the constitutional right of these young women to access abortion care. But this case has been tried before, over a population with a similarly restricted ability to exercise some of their constitutional rights: namely, women who are incarcerated.

As important as we hold our constitutional rights to be, we do acknowledge that our government at times may have legitimate cause to restrict them to varying degrees.

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[64] Maureen Paul and Tara Stein, "Abortion." In *Contraceptive Technology*, by Robert A. Hatcher, MD et al. (Bridging the Gap Communications, 2011).
[65] Bhatti et al., "Medication abortion reversal: science and politics meet," *American Journal of Obstetrics & Gynecology*, 2018.
[66] Ibid.
[67] Ibid.
[68] Garza v. Hargan

One circumstance in which many of our personal liberties are so limited is when we commit a crime and are serving justly apportioned time in prison. Pregnancy and abortion are issues that women grapple with regardless of incarceration status, and the courts have wrestled with the question of an incarcerated woman's right to access abortion care for decades, almost since the passage of *Roe v. Wade* itself. The establishment of the *Estelle* and *Turner* standards, related to medical care and the curtailing of constitutional rights more broadly speaking, provided legal language with which to consider abortion access.

In *Estelle v. Gamble*, the Supreme Court considered the case of an inmate with a back injury who claimed he had received "inadequate treatment" while in prison.[69] The Court found that the Eighth Amendment, which prohibits the use of "cruel and unusual punishments," protects prisoners' right to access adequate medical care.[70] The Court outlined a "two-prong" standard against which a claim should be evaluated for validity under this ruling: first, that the inmate had "serious medical need"; and second, that prison officials treated that need with "deliberate indifference."[71]

Turner v. Safley concerned the extent to which prisoners' rights may be "significantly curtailed."[72] The case before the Court concerned a prison regulation that prohibited inmates from getting married. In outlining the Turner standard, the Court said that when a regulation limits a prisoner's constitutional rights, the institution must show: there must be a "valid, rational connection" between the regulation and the government interests purportedly served by the regulation; "alternative means" by which the prisoner can exercise the right under restriction; that accommodating the right would have "serious

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[69] Sarah Tankersley, "Reproductive Freedom: Abortion Rights of Incarcerated and Non-Incarcerated Women," *The Kentucky Law Journal* 85, no. 1 (1996).
[70] Ibid.
[71] Ibid.
[72] Ibid.

detrimental impact" on other prisoners or prison officials, or the "allocation of prison resources"; and that the institution has no other way to accommodate the right in question without causing serious detriment.[73] Under this standard, the regulation prohibiting inmates from getting married was struck down for its lack of a connection to a legitimate penological or governmental interest, but a ban on inter-facility correspondence between inmates was upheld due to such activity's potential to facilitate organized crime.[74]

In 1987, the Third Circuit Court of Appeals used both the *Estelle* and *Turner* standards to uphold inmates' right to access abortion care in *Monmouth County Correctional Institution Inmates v. Lanzaro*. The female inmates behind this class action lawsuit sought relief from a regulation that required any inmate seeking abortion care to first apply for a court-ordered release.[75] The county also refused to directly provide abortion care except in cases of "life-threatening emergency," and required inmates seeking "elective" abortion care to provide the funding themselves.[76] The court found that under the *Estelle* standard, the regulation requiring inmates to obtain a court-ordered release represented "deliberate indifference to a serious medical need" on the part of the facility.[77] Under the *Turner* standard, the court found no "valid, rational connection" between the regulation and any legitimate penological interest.[78]

Although the "elective" nature of most abortions has resulted in some mixed dialogue, courts have consistently ruled against blanket legislation that restricted women's access to abortion, regardless of their incarceration status, on the grounds that it interferes

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[73] Ibid.
[74] Ibid.
[75] Rachel Roth, "Do Prisoners Have Abortion Rights?," *Feminist Studies* (2004).
[76] Ibid.
[77] Ibid.
[78] Ibid.

with their rights under the Fourteenth Amendment as outlined in *Roe v. Wade*.[79] Furthermore, in cases in which a woman seeks access to abortion for "specific health concerns," courts have ruled that corrections facilities must assume those costs in the same manner as for other serious medical needs.[80] Studies have found that the relatively consistent legal landscape has not necessarily guaranteed commensurate practical access for incarcerated women, in counties and states across the country,[81] but the foundation is there and interested parties continue to push for a reality that matches the current legal standard.

The parallels with the limited rights we nonetheless afford undocumented immigrants are striking. Our own legal history would suggest that this question should be settled, unless the government is willing to assert that undocumented immigrants simply have no constitutional rights. And some State Attorneys General, including Texas AG Ken Paxton, have argued just that. Paxton and company have argued that undocumented immigrants have no right to due process under the Fifth Amendment, without which foundation the current Janes have no legal standing for their case at all. This argument is offered in spite of the fact that the Supreme Court has already ruled, twice, that "once a person is in this country, regardless of how they got here, they are entitled to constitutional protections."[82]

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[79] Diana Kasdan, "Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict With Constitutional Standards?" *Perspectives on Sexual and Reproductive Health* 41, no. 1 (2009).
[80] Ibid.
[81] Carolyn B. Sufrin, Mitchell D. Creinin, and Judy C. Chang, "Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers," *Perspectives on Sexual and Reproductive Health* 41, no. 1 (2009).
[82] Jessica Mason Pieklo. 2018. *Texas Attorney General: Undocumented Minors Aren't Entitled to Due Process Rights.* January 9. https://rewire.news/article/2018/01/09/texas-attorney-general-argues-undocumented-minors-not-entitled-due-process-rights/.

"Ad Hoc" Policymaking: What America Needs, or What it Deserves?

Attorney General Paxton's assertion, which goes against the legal precedent set by the Supreme Court, is part and parcel of a pattern of ad hoc policymaking set by multiple individuals involved in this case, who have the power to at least temporarily enforce their administrative will. The memo used by Ken Tota, and later by Scott Lloyd, had been "on the books" since 2008, yet no prior ORR Director had used it to become directly involved with undocumented minors' ability to access abortion care—not even Tota himself, during his brief prior tenures as Acting Director in 2008 and 2015. Why do these political actors feel now empowered to disregard both norms and laws, in favor of imposing their own will on those subject to their authority? What wisdom does the broader legal landscape have to offer about this case? And even if HHS and ORR policy were clearly articulated and well-crafted, what good is such policy when administrative entities do not exercise political will and enforce it, as in the case of the compromises offered to (and ignored by) faith-based VOLAGs?

In political campaigns, candidates often engage in simplistic rhetoric about policy issues that have a complex history and which are, in and of themselves, multifaceted and interconnected. Once in office, the heat of the campaign fades and the candidate is faced with the reality of governing in cooperation with others—who may nor may not share their views—and within preexisting political structures, both official and unofficial. In such circumstances, these newly-elected individuals typically adapt their behavior to suit the expectations and the defined role of their office.

Since Donald Trump assumed office in January of 2017, these expectations have been flouted at almost every turn. He has ignored many norms associated with the presidency—from the complete and transparent divestment of business ties that may result

in a conflict of interest, to the avoidance of the appearance of nepotism, to the assumed tenor with which the president will engage in public communications. He has also disregarded general legal wisdom in his decision to enact the so-called "Muslim travel ban," one of the most high-profile planks of his campaign platform (multiple Executive Orders signed to this effect have been overturned in court). Perhaps it shouldn't be surprising, then, that his political appointees take their cues from him and feel a similar freedom to ignore norms, both political and legal, as they wield their newly-acquired administrative power.

Fortunately, we have a rich legal history within which to consider the merits (or lack thereof) of the government's actions in this case. We don't have to look back very far to see other examples of evolving law and policy that illuminate the issues at hand. Only three years ago, the longstanding debate over gay marriage resulted in the landmark ruling by the Supreme Court in *Obergefell v. Hodges*. The Court found that same-sex couples have the fundamental right to marry under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[83] The *Obergefell* decision bears on the evolving legal arguments for abortion access, both broadly and with respect to the narrow population discussed in this paper, in several ways.

First, the distinction between negative and positive rights. This distinction concerns a citizen's right to be free from governmental interference in their exercise of a right (a negative right), as opposed to their right to the active protection and facilitation of their exercise of that same right (a positive right).[84] This distinction forms part of the rationale used by the Court in *Harris v. McRae* to uphold the constitutionality of the Hyde

[83] Kenji Yoshino, "A New Birth of Freedom?: Obergefell v. Hodges," *Harvard Law Review* 129, no. 147 (2015).
[84] Ibid.

Amendment. Specifically, the Court asserted that while a woman has the right to be free from government interference in her decision to terminate a pregnancy—a negative right guaranteed by the Due Process Clause under the Fourteenth Amendment per *Roe v. Wade*—she has no corresponding (positive) right to receive funding from the government to enable her exercise of that freedom to choose, should she lack the financial resources to do so herself.[85] The United States as a whole, and the Supreme Court in particular, have tended to more consistently and comfortably affirm negative rather than positive rights.[86]

Second, *Obergefell* reveals the different weaknesses and strengths associated with legal cases founded on privacy, under the Due Process Clause, as opposed to equality under the Equal Protection Clause. Legal historians and analysts have noted these differences in their assessments of the fight for LGBTQ equality and the fight for reproductive rights. While the right to an abortion was outlined and protected as an issue of privacy under the Due Process Clause in *Roe v. Wade*, LGBTQ activists and the lawyers who support them have consistently rooted their case on a right to equality under the Equal Protection Clause.[87] In what is considered an important predecessor to *Obergefell*, the Supreme Court overturned a Texas law against sodomy in the 2003 case *Lawrence v. Texas*. They did so on the basis of the right to privacy, but while she concurred with the majority, Justice Sandra Day O'Connor considered the law unconstitutional on equal protection grounds.[88] This combined argument for privacy and equality also compelled the Massachusetts Supreme Court to guarantee same-sex couples in their state a constitutional right to marry, becoming the first in the country to do so.[89]

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[85] Jill E. Adams and Jessica Arons, "A Travesty of Justice: Revisiting Harris v. McRae," *William & Mary Journal of Women and the Law* 21, no. 1 (2014).
[86] Yoshino, "A New Birth of Freedom?: Obergefell v. Hodges."
[87] Jill Lepore, "To Have and to Hold." *The New Yorker*, May 25, 2015.
[88] Ibid.
[89] Ibid.

The argument for abortion access, meanwhile, suffers from its narrow support under the negative right to privacy, and with no formal legal recognition of its merits under the Equal Protection Clause. Some scholars have argued that decisions founded on the recognition of this highly restricted argument, such as *Harris v. McRae*, should be overturned because of their disproportionate impact on low-income women of color.[90] Women are not considered a "suspect class" for the purposes of determining the appropriate level of legal scrutiny in an Equal Protection Clause case. However, legislation such as the Hyde Amendment (and policy such as that adopted by ORR with regard to undocumented female minors seeking abortion care) primarily affects a population whose disadvantages are so compounded by these additional factors, they should raise the standard for the Court's consideration.[91]

Ultimately, the strength of these constitutional principles rests on how well we uphold them for everyone in like circumstances, whether we personally agree with them or not. After *Obergefell*, we saw a public official take action that resembles Scott Lloyd's. Kim Davis, a county clerk in Kentucky, imposed her personal religious beliefs on the general public under her purview by declining to provide marriage licenses to *anyone*, in protest against the *Obergefell* ruling—and she was far from the only administrative actor to do so.[92] There are ongoing attempts to legislate religious exemptions for public servants, and as mentioned previously, his actions of late aren't the first time Lloyd has been involved in this issue. Such exemptions are not aligned with the spirit behind the constitutional protection of fundamental rights. When an individual acts as a public servant, or a collective entity engages with the public on behalf of the government, their actions are

[90] Adams and Arons, "A Travesty of Justice: Revisiting Harris v. McRae."
[91] Ibid.
[92] Yoshino, "A New Birth of Freedom?: Obergefell v. Hodges."

reflective of and bound by the obligations of the state. We can see the consequences of such attempts to allow personal liberty within such a role to co-exist at an equal level with the rights of the public. VOLAGs' consistent refusal to abide by policies designed to protect the most vulnerable people in ORR's care has caused significant physical and psychological harm to young women who have already suffered beyond comprehension.

Individuals and collective entities who engage in these "protests" often purport to do so out of a desire to meaningfully counteract laws they deem unjust or intolerable. Yet such administrative obstruction does nothing to alter the laws of the land, regarding same-sex marriage or abortion or any other standing Supreme Court decision. In yet another case of direct ORR interference, in February of this year an undocumented female minor in Texas sought a judicial bypass to access abortion care.[93] She changed her mind during her meeting with the judge and her case was dismissed, but in the written order, the judge addressed the broader issues at play:

> As a result of ORR's refusal to transport [the minor] to the judicial bypass hearing scheduled for February 12, 2018, [the minor]'s day in court was delayed twenty-four days. In the event [the minor] had wished to pursue an abortion, said abortion would have been more dangerous to the health of [the minor] with each passing day. *The abortion debate is not at issue in a judicial bypass hearing.* The primary purpose of said hearing is obtaining a judicial order allowing waiver of parental notice and waiver of parental consent, if the subject individual can prove by clear and convincing evidence the necessary elements of consent and need.[94]

ORR's argument that they or their grantees should not be required to transport a minor in their custody to receive abortion care because that would involve the government too directly in the provision of abortion doesn't hold water. ORR arranges for transportation for minors for a variety of reasons, health-related and otherwise. To suggest

[93] Jane Doe v. Office of Refugee Resettlement. 1:18-cv-00026 (U.S. District Court, S.D. Tex. 2018)
[94] Ibid.; emphasis mine.

that engaging in the exact same activity is somehow fundamentally different because of the nature of the appointment scheduled is absurd. If transportation to and from appointments is one of the services ORR provides, it must be provided in all cases.

We must be able to rely on our public servants and institutions to respect the results of those arguments that survive the prolonged and rigorous journey up to and out of the Supreme Court. We must also acknowledge the evolving nature of law, and that our constitution is a "living document." Indeed, it is precisely because there are formal mechanisms by which lawmakers and legal actors can re-engage with the courts over any given decision, it is important that other public servants and entities act within the law as it stands. In this case, the right to an abortion and the boundaries within which government regulation of that right must remain have been outlined and affirmed in a series of Supreme Court decisions, from the landmark case *Roe v. Wade* in 1973 to the most recent *Whole Women's Health v. Hellerstedt* in 2016.[95] The abortion debate is not at issue in any provision of service required of ORR, any more than it is in a judicial bypass hearing, regardless of Scott Lloyd's feelings on the subject.

POLICY CRAFT AND POLITICAL WILL

Several features of ORR's policy on these matters, both written and operationalized, stand out as immediate candidates for change. In the order granting the ACLU their temporary injunction against the administration, the D.C. District Court criticized multiple aspects of the ORR's actions. Setting partisan leanings aside, no single person should have such complete authority, subject to no immediate oversight, over the sensitive and time-bound decisions of such vulnerable individuals. Scott Lloyd's assertion of sole veto power over the decision to have an abortion by any and all women in ORR's

[95] Garza v. Hargan

care reveals that no ORR (or HHS) policy currently exists that would prohibit such a move. Further, his deposition reveals that he uses no clear rationale when denying access to abortion care, even though he has done nothing but deny such petitions since becoming ORR Director.[96] No citizen should be easy about the notion of someone's constitutional rights being so easily curtailed by one government official, and indeed, the District Court explicitly expressed such concern in the aforementioned order, nothing that:

> ORR's policy is premised on the notion that the Director is entitled to exercise complete control over female UCs' reproductive decisions by virtue of the fact that they are undocumented minors in ORR custody. The adoption and implementation of such a policy is itself sufficient to raise constitutional flags.[97]

Even if we were to ignore the clear ideological motivations for this policy and assume Lloyd and ORR are acting in good faith, the policy itself is cumbersome and the logic behind its application is necessarily opaque to all but Lloyd himself. Instead, such decisions at ORR should be subject to a clearly outlined process by which denials are justified with evidence for the necessity of such a measure, or prior precedent shaped by consistent interpretation of policy (other than simply a string of refusals with no clear rationale).

Having a clear process would mean that the final signature approving an undocumented minor's request need not rest only with the ORR Director. ORR could vest a reasonable number of officials at or above a certain level of experience or duration of employment with the signatory power over these cases, so that petitioners could receive decisions in a timely fashion. As the District Court noted, "the right of every pregnant minor in ORR custody to seek an abortion is necessarily time limited, and with the passage of time, the risk that she will no longer be afforded a choice—along with the associated

[96] Garza v. Hargan
[97] Ibid.

health risks—increase."[98] The urgent nature of this matter for the minors in question should be a priority for ORR in shaping policy around this issue.

All of this, though, is predicated on the notion that abortion should be categorized as a "serious medical service" per the 2008 memo mentioned previously. It should not. In ORR's own guidelines for care providers responding to medical emergencies, they characterize a "serious medical condition" as something "caused by injury, illness, or toxic exposure that is *life threatening in nature*."[99] An abortion only becomes life threatening in conjunction with other medical complications, and then only later in the pregnancy.[100] An elective abortion that falls within the legal timeframe anywhere in the United States is extremely unlikely to have serious medical consequences for the woman undergoing the procedure.[101] This is additional evidence for the case that categorizing abortion this way is driven by ideology on ORR's part. The general safety of both surgical and medication abortions warrants a change in that categorization. For an unaccompanied minor who has the funds and support, and who has successfully navigated the legal barriers in whatever state in which she resides, ORR itself should not be an additional barrier she has to surmount.

Such policy recommendations are well and good, but we must also acknowledge their uselessness in the absence of the political will to enact and enforce. The law clearly states that no individual or entity may wield a veto over a minor's decision to terminate a pregnancy.[102] We also see that policies are already on the books to ensure access to

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[98] Ibid.
[99] "ORR Guide," Office of Refugee Resettlement; emphasis mine.
[100] Paul and Stein, "Abortion."
[101] Ibid.
[102] Sanger, *Abortion*.

contraception and abortion care for unaccompanied minors,[103] but evidence suggests that ORR has not enforced that policy to its fullest extent.

ORR's longstanding relationship with religious VOLAGs complicates this issue. By largely delegating the provision of necessary services for these vulnerable populations to faith-based VOLAGs, allowing them to bear a significant part of the cost, and refusing to withhold federal grants unless existing regulations are respected, the government has abdicated its duty in these matters. To some degree, these religious NGOs have the money to do this work precisely because of their faith and corresponding non-profit, tax exempt status. This makes it difficult, at least on the surface of things, for the government to then demand they provide services to which they object on religious grounds. The root of this problem, then, goes back to the separation of church and state, and the blurring of that line that comes with such extensive cooperation between governmental and faith-based entities (and the simultaneous lack of enforcement when it comes to the secular standards of the state).

It is also time to affirm the positive right to abortion care, especially for populations with such limited power for self-advocacy and self-determination. The recent decision in *Obergefell* provides a fresh avenue for the consideration of this fundamental right under a combined assessment of Due Process and Equal Protection merits. Lawyers, legal scholars and advocates are undoubtedly already exploring the possible implications of the *Obergefell* ruling for abortion rights, but a case compelling enough to sway the Supreme Court may take years to make its way through our legal system. In the meantime, Congress and ORR could take independent action. Congress could decline to renew the Hyde Amendment, which continues to pass as part of the HHS appropriations bill every year.

[103] Eckholm, "Suit Challenges U.S. Over Abortions and Birth Control for Immigrant Minors."

Under the Obama Administration, ORR regularly approved abortion funding for minors whose pregnancies resulted from rape. They could return to such a practice, and were the restrictions stemming from the Hyde Amendment lifted, they could specifically appropriate enough funding to ensure access to abortion for any minor in their care who needed it.

States that have not yet done so could also take action by ratifying the Equal Rights Amendment to our constitution. Were this amendment to take effect, it would counteract the current legal holding that women are not a "suspect class" and would require laws that purport to regulate the fundamental rights of women, such as access to abortion, to be analyzed under "strict scrutiny." This would make them much less likely to pass constitutional muster, giving relief to all women, but especially those most impacted by restrictions on abortion—such as the Janes being defended by the ACLU.

As a society, we have recognized that we have an obligation to our most vulnerable members. It is time we live up to that obligation for these young women, and every young woman to come after them.

PART TWO

In this section, I developed a document intended to enable interested parties to engage with the issues discussed above in an informed, meaningful way. In consultation with Jane's Due Process, the Texas organization mentioned previously, I produced a "press primer" targeted at journalists and other entities in the press who do not have long-standing experience covering events or cases that touch on these issues. Heightened interest as a result of increased administrative activity may motivate expanded coverage, and it is my hope that I can help provide a foundation for well-informed discussion and analysis.

Undocumented Minors and Abortion Access: A Press Primer

Garza v. Hargan: **The ACLU case against ORR**

Four Janes—Doe, Poe, Roe and Moe—now form the basis of a class action lawsuit against ORR, challenging a new ORR policy that requires the director to approve each minor's request for abortion.. Each Jane is an undocumented minor who sought abortion while in ORR custody.

In March of 2017, ORR Acting Director Ken Tota issues a memo reinterpreting prior policy and requiring all minors in ORR custody to receive approval from the Director before obtaining an abortion. Scott Lloyd is then appointed ORR Director and refuses permission for any minor to receive abortion care.

The ACLU sues on behalf of Jane Doe in October of 2017, subsequently adding the additional Janes to their suit. The D.C. District Court grants abortion access to the individual Janes and considers the ACLU's request for a temporary class action injunction.

After several months of fact-finding and depositions, the court grants the temporary injunction on April 3rd, 2018. The court finds support for the ACLU's claims that ORR is in violation of the Flores Agreement, as well as SCOTUS decisions in *Roe* and *Bellotti*, and allows their lawsuit to proceed under class certification.

Relevant Supreme Court decisions (in chronological order):

- *(1973) Roe v. Wade*—landmark case protecting the right to abortion under Due Process Clause of the Fourteenth Amendment; such constitutional rights have been extended to undocumented immigrants by the Supreme Court—see *Plyler v. Doe, Zadvydas v. Davis*
    - *Unaccompanied vs. accompanied immigrant minors*—this status determines federal agency oversight; unaccompanied minors fall under the purview of the Office of Refugee Resettlement [ORR] instead of Immigration and Customs Enforcement
- *(1979) Bellotti v. Baird*—protected the right of minors to seek abortion; required legal alternative if a state requires minors to obtain parental consent
    - *Judicial bypass*—the mechanism by which a minor can obtain a judge's consent to an abortion in lieu of parental consent; the minor and their lawyer meet with the judge in a closed, confidential hearing
- *(1980) Harris v. McRae*—upheld the constitutionality of the Hyde Amendment
    - *The Hyde Amendment*—a restriction on federal funding of abortion except in cases of rape, incest, or to save the life of the mother; passed annually as part of the appropriations bill
- *(1992) Planned Parenthood v. Casey*—clarified standard of scrutiny for laws restricting abortion as whether they impose an "undue burden"
- *(1997) Flores v. Reno*—class action lawsuit filed on behalf of undocumented minors; resulted in the Flores Agreement, which specifies minimum standards of care for undocumented minors in federal custody
- *(2016) Whole Women's Health v. Hellerstedt*—affirmed "undue burden" standard

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